



## **Case Summary**

Tracy D. Mayes (“Mayes”) appeals his sentence for Operating a Motor Vehicle While Intoxicated Causing Serious Bodily Injury (“OWI-CSBI”), as a Class D felony,<sup>1</sup> and Operating a Motor Vehicle with Suspended or Revoked Driving Privileges within Ten Years of Prior Similar Infraction, a Class A misdemeanor.<sup>2</sup> We affirm.

## **Issues**

Mayes raises two issues on appeal, which we restate as follows:

- I. Whether the trial court abused its discretion in not finding his mental health as a significant mitigating circumstance; and
- II. Whether his sentence is inappropriate.

## **Facts and Procedural History**

On August 28, 2004, Mayes was driving a vehicle with alcohol in his system. He struck a five-year-old child, crushing him between two cars. The child’s facial bones were crushed. He suffered severe lacerations on his head. An arm and a leg were badly broken. He lost an eye and is now blind because of optic nerve damage. Parts of his scalp will never again grow hair. He must breathe through his mouth because of damage to his nose. He needed many surgeries to reconstruct his face. Other children mocked him for his appearance. One week a month, the child leaves his home to attend the Indiana School for the Blind in Indianapolis.

The State charged Mayes with three OWI-related counts, the Class A misdemeanor, and a traffic infraction. After an evidentiary hearing in June 2005, his bond was reduced.

---

<sup>1</sup> Ind. Code § 9-30-5-4.

Mayes then failed to appear for eight consecutive hearings, from September 2005 through March 2007. The U.S. Department of Veterans Affairs (“V.A.”) reported that Mayes was discharged from a treatment program in January 2006 “due to going AWOL” and that he was discharged from a second treatment program in May 2006 “due to non-compliance.” Defendant’s Exhibit 1. Although Mayes was supposed to meet with the V.A. staff once or twice per week, he had only three contacts with them in the eight months from August 2006 through March 2007. A bench warrant was issued in March 2007 and served in September 2007.

After five additional continuances and almost three-and-a-half years after the incident, the parties met in court. Mayes pled guilty, without a written plea agreement, to OWI-CSBI, the Class A misdemeanor, and the infraction. The State agreed not to file an allegation that Mayes was a habitual offender.

During the sentencing hearing, the victim, still a child, testified as to his experiences and reflected selflessly on the impact to his grandmother; specifically, that the incident occurred in front of her house on her birthday. The trial court found four aggravating circumstances: a criminal history; a probation violation; that the victim was under age twelve; and that the “harm, injury or loss suffered by the victim was significant and greater than the elements necessary to prove the commission of the crime.” Appendix at 28. The trial court found Mayes’ admission of guilt and expression of remorse to be mitigating. Also, the trial court found “that the aggravators, each and every one of them alone, outweigh the mitigator.” Id. The trial court imposed the maximum terms of three years for OWI-CSBI

---

<sup>2</sup> Ind. Code § 9-24-19-2.

and one year for the Class A misdemeanor, to be served consecutively and executed fully.

Mayes now appeals.

### **Discussion and Decision**

As an initial matter, we note that the offenses occurred before the General Assembly made significant changes to Indiana's sentencing statutes. Accordingly, we analyze this case under the presumptive sentencing scheme in place at the time of the offenses. See Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (clarifying that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime").

#### **I. Mitigating Circumstance**

Mayes argues that the trial court abused its discretion in not finding his mental health as a significant mitigating circumstance. Generally, sentencing determinations rest within the trial court's discretion. Powell v. State, 769 N.E.2d 1128, 1134 (Ind. 2002). We review trial court sentencing decisions only for an abuse of discretion, including a trial court's finding of mitigating circumstances and its decision to impose greater than the presumptive sentence because of aggravating circumstances. Id. The trial court is not obligated to accept the defendant's contention as to what constitutes a mitigating circumstance. Id. at 1135. Mayes was required to establish that the mitigating evidence was both significant and clearly supported by the record. Id.

Mayes served in the U.S. Army for four years and was active in two war tours: Operation Just Cause in Panama in 1989 and Operation Desert Storm in 1991. He witnessed death and destruction in both operations, including the deaths of multiple U.S. soldiers. His

duties included parachuting into areas to secure them, firing upon enemy aircraft, and patrolling a border. After his honorable discharge from the U.S. Army, he was diagnosed with post-traumatic stress syndrome,<sup>3</sup> schizophrenia, and personality disorder. For some years, he had been receiving \$3000 per month in disability benefits. Nonetheless, Mayes himself offered into evidence a V.A. report stating clearly that he was not complying with the terms of the V.A.'s programs. Thus, Mayes emphasized the consequence of his mental health, while demonstrating that he was not taking steps to address it. While we respect Mayes' service to his country, we cannot conclude that the trial court abused its discretion in failing to find Mayes' mental health to be a significant mitigator.

## II. Appropriateness of Sentence

Mayes asks this Court to revise his sentence from four years to two-and-a-half years. We will not revise a sentence authorized by statute unless it is inappropriate in light of the nature of the offense and the character of the offender. Booker v. State, 790 N.E.2d 491, 496 (Ind. Ct. App. 2003), trans. denied. See also IND. CONST. art. VII, § 6; and Ind. Appellate Rule 7(B). In reviewing a sentence, we consider the presumptive sentence, here, eighteen months for a Class D felony (Ind. Code § 35-50-2-7), as well as the aggravating and mitigating circumstances listed in Indiana Code Section 35-38-1-7.1. Booker, 790 N.E.2d at 496-97.

As to the nature of the offense, Mayes almost killed a five-year-old child, who can no longer see and whose breathing was impaired by the incident. His actions caused the child to

---

<sup>3</sup> The parties' briefs each referred to post-traumatic stress disorder, but the pre-sentence investigation report indicated that Mayes had been diagnosed with post-traumatic stress syndrome.

undergo multiple surgeries and to regularly leave his home for instruction at a school in Indianapolis.

Regarding Mayes' character, the record reveals a significant criminal history and a series of arrests subsequent to this tragic incident. Furthermore, Mayes failed to comply with the treatment programs offered by the V.A. Based upon our review of the record, we conclude that Mayes' sentence is not inappropriate.

### **Conclusion**

The trial court did not abuse its discretion in sentencing Mayes. His sentence is not inappropriate.

Affirmed.

RILEY, J., and BRADFORD, J., concur.